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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ORTHO BIOTECH PRODUCT, L.P., : Docket No. 2:05-cv-04850 (SRC)
:
Plaintiffs, :
:
vs. :
:
AMGEN, INC., : Newark, New Jersey
: Friday, February 1, 2008
Defendants. : 10:45 a.m.

TRANSCRIPT OF DISCOVERY MOTIONS
BEFORE THE HONORABLE MICHAEL SHIPP, U.S.M.J.

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1 (Proceedings begin at 10:45 a.m.)

2 THE COURT: Okay. This the matter of Ortho Biotech
3 Products v. Amgen, Docket No. 05-4850.

4 Counsel, may I have your appearances for the record,
5 please?

6 MR. HAAS: Your Honor, Erik Haas with Patterson,
7 Belknap, Webb & Tyler on behalf of Plaintiff Ortho Biotech.

8 THE COURT: Good morning.

9 MR. HAAS: Good morning.

10 MR. TIMPONE: Walter Timpone, Your Honor, McElroy,
11 Deutsch, Mulvaney & Carpenter.

12 THE COURT: Good to see you, Mr. Timpone.

13 MR. GRIFFINGER: Good morning, Your Honor, Michael
14 Griffinger from Gibbons for Amgen.

15 THE COURT: Good morning.

16 MR. WHITNEY: Good morning, Your Honor, Doug Whitney,
17 McDermott, Will & Emery on behalf of Amgen.

18 THE COURT: Good morning.

19 MR. QUINN: Good morning, Mike Quinn from Gibbons and
20 also with us is Mary Beth Cantrell from Amgen.

21 THE COURT: Okay. Good morning.

22 MR. WALSH: And Chris Walsh from Gibbons also, Your
23 Honor.

24 THE COURT: Good to see you as well.

25 All right. By way of background, counsel raised a

1 number of outstanding discovery disputes in correspondence to
2 the Court in November and December 2007. This Court conducted
3 an in person status conference on December 12, 2007. At that
4 time I instructed counsel to meet and confer and attempt to
5 resolve any outstanding discovery-related disputes between
6 themselves.

7 I also advised counsel to provide the Court with a
8 letter regarding any issue that could not be resolved and that
9 the Court would hear oral argument on those issues.

10 Counsel raised three outstanding discovery-related
11 issues in their joint submission to the Court dated January
12 22nd, 2008. The issues are:

13 One, the dispute regarding the propriety of Amgen's
14 privilege assertions at the deposition of Ed Hansen in
15 connection with the document inadvertently produced by Amgen
16 during discovery.

17 Two, the dispute regarding which party should bear
18 Amgen's costs associated with the review and production of
19 documents from Amgen's discovery disaster recovery tapes.

20 Three, the dispute regarding a potential extension of
21 discovery time.

22 The January 22nd, 2008 joint letter referenced an
23 additional issue raised by Ortho; namely, the propriety of
24 certain redactions in Amgen's document production. Ortho
25 viewed the issue as properly framed and Amgen believed that the

1 issue was inconsistent with the Court's instructions to the
2 parties during the December 12 conference to refrain from
3 making any additional substantive submissions.

4 The Court was willing to address all the discovery-
5 related disputes this morning. Toward the beginning of this
6 week I asked whether Amgen's counsel could respond to the issue
7 in advance of today's oral argument. On January 29th, 2008,
8 counsel advised the Court that it needed approximately seven
9 days to adequately address the issue. I understand Amgen's
10 position and decided to proceed as follows:

11 First, Amgen should submit its response regarding the
12 propriety of certain redactions by Friday, February 8th, 2008.

13 Second, Ortho may submit a reply by Friday, February
14 15th, 2008.

15 Even though we have an outstanding issue, I did not
16 want to postpone this morning's oral argument on the issues
17 that are ready for argument. The Court will tentatively
18 schedule oral argument on the redaction issue for Friday,
19 February 29th, 2008 at 3 p.m., at which time the Court will
20 render its decision on all of the discovery-related issues.

21 If the Court does not feel the need to hold oral
22 argument on the 29th, it will notify counsel of the same and
23 will put its decision on the record on the 29th.

24 The Court will now hear oral argument on the three
25 discovery-related issues. First, the dispute regarding the

1 propriety of Amgen's privilege assertions at the deposition of
2 Ed Hansen, and in connection with the document inadvertently
3 produced by Amgen during discovery.

4 Let's hear first from counsel for Ortho. Mr. Haas?

5 MR. HAAS: Thank you, Your Honor.

6 Your Honor, Amgen has made as you noted two privilege
7 assertions to preclude Ortho discovery of financial analysis
8 Amgen conducted in connection with its 2007 strategic analysis.
9 The first is the privilege assertion over the document
10 submitted in-camera, and that document itemized financial
11 analyses that Amgen was to conduct in 2007. It was a list of
12 financial analyses done in the regular course of business.
13 There's a list of analyses done, and it identified the
14 individuals, the employees at Amgen who were responsible for
15 completing those financial analyses.

16 Second, Amgen cut off 30(b)(6) testimony at
17 deposition on issues of Amgen's financial analyses which
18 Amgen's own e-mails that were admitted at deposition clearly
19 demonstrate was done as part of its 2007 contract strategy.
20 It's our position that those privilege assertions were patently
21 inappropriate. The law is clear. When analysis is done for
22 business purposes, Amgen may not shield that analysis merely by
23 disclosing it to counsel.

24 So under that clear and undisputed rule as the facts
25 here play -- as they play out, demonstrate that that

1 information is discoverable. And I think there's three key
2 things to note here:

3 First, the plain language of the documents. And I
4 point Your Honor in particular to the document that was
5 submitted in-camera.

6 And if, Your Honor, may I approach?

7 THE COURT: Sure.

8 MR. HAAS: I pulled these out to make it simpler for
9 us to do.

10 MR. GRIFFINGER: Thank you.

11 MR. HAAS: Of the exhibits that we submitted, Your
12 Honor, I pulled out the three that demonstrate our points most
13 succinctly. The first is a document that was submitted in-
14 camera. Now as I noted, this is a list of financially (sic)
15 analysis Amgen is to conduct. And if you just walk down the
16 list, it is evident from the description that these are the
17 types of analyses that are done in the regular course of
18 business.

19 For the first one, for example, how can we get
20 appropriate reimbursement rate to go down with Aranesp to
21 improve our family CR?

22 CR, Your Honor, is a reference to margin. And on the
23 first page of the first document it's the document with a Bates
24 stamped AMGM-01557993. Your Honor --

25 THE COURT: I'm with you.

1 MR. HAAS: Okay. So I'm just referencing the
2 individual items --

3 THE COURT: Sure.

4 MR. HAAS: -- each one of these is numbered. I'm
5 starting with the first one. I'm just going to pull a few out,
6 so we can talk about it. But it says, how do we get
7 appropriate reimbursement that's our drug, Ortho's drugs
8 reimbursement down with Aranesp to improve family CR -- to
9 improve family margin?

10 Your Honor, that's what this case is about. It's
11 about the comparison of margin of Procrit, to the comparison of
12 margin on their portfolio of drugs. What Amgen is debating
13 here is an internal business move of how they are --

14 THE COURT: CR is cost recovery?

15 MR. HAAS: Cost recovery, Your Honor. That's Amgen's
16 term for margin to oncologists. How much margin can doctors
17 make on their portfolio, and that's it. It's a comparison of
18 their portfolio versus our drug. And what we argue in this
19 case is that comparison which they -- we contend is an anti-
20 competitive arrangement, where they've got portfolio versus an
21 individual drug, well, it's our view that's anti-competitive.
22 They're saying, how can they improve that situation? So to as
23 to improve their competitive position.

24 So that's point one.

25 And each of these as we walk down are examples of the

1 same thing.

2 Number five, analysis of retail market and benefits.
3 What are ASP analytics with current retail forecast? How do we
4 ship to retail business? Your Honor, that's an analysis of how
5 to shift share, that's a business analysis. That's an analysis
6 that's important for this case because what they want to do is,
7 they want to build up their retail share because by doing so,
8 that subsidized their price, that subsidized their
9 reimbursement, that improves their margin.

10 I know this is getting a little bit into the weeds,
11 but that is an issue that has been raised in this case as to
12 whether and to what extent Amgen can raise its retail share to
13 improve their position without engaging in their anti-
14 competitive bundle. Okay?

15 So it's a business concern.

16 And each one of these is like this. You turn to the
17 second page, all these initials of the participants, these are
18 individual business people. There's not a single lawyer there.
19 These are individual business people. They look at the
20 support, so they've got who's responsible for this project, who
21 has the support role, who is supposed to be doing the work with
22 the responsible person, and what is the due date for the
23 analysis. All business people, no lawyers, work that has to be
24 done for the business.

25 Turn to the next page, the third page and we go on.

1 What is the value of -- I'm looking at Item No. 10 now. What
2 is the value of selling some Aranesp in dialysis? Can we use
3 it to temporarily boost ASP?

4 Again, the issue in this case, is there an
5 alternative to the bundle? One alternative Amgen had, rather
6 than engaging in this competitive conduct, was to convert a
7 market from its drug Epogen to its drug Aranesp.

8 Now what that would have done is, it would have
9 improved their ASP, their reimbursement rate for Aranesp,
10 making them more competitive for Aranesp against Procrit. That
11 would allow them to engage in head to head competition. They
12 wouldn't have needed to bundle.

13 So what that is, is an analysis of whether and to
14 what extent they need to bundle at all. That again is a
15 business analysis. And I can march through each one of these,
16 Your Honor. Each one if you look at them, the plain language
17 demonstrates.

18 Yeah, look at Number 19, for example.

19 THE COURT: Let's look at Number 11. "Can we create
20 a contract based on growth of market instead of share -- and I
21 have a very small version here -- sales that's more litigation
22 friendly?"

23 And I understand that there are some of these that
24 kind of hedge. But I'm more interested in the ones that may
25 cut directly and have a closer bearing upon litigation.

1 MR. HAAS: That -- that's an interesting --

2 THE COURT: Aside from just the use of the word
3 "litigation."

4 MR. HAAS: Right. And that's exactly the situation.
5 And you know what, it goes exactly to what they did.

6 What they did is, they modeled APC2006. This is a
7 contract -- this is a document that is in the 2006. It's
8 contemplating the contract that is to go into place in 2007.
9 And what they're saying is, we have this -- you know, they
10 recognize they have a coercive bundle out there. They have
11 this bundle that we are challenging.

12 THE COURT: Uh-huh.

13 MR. HAAS: And they are saying, all right, what can
14 we do cosmetically to make it more litigation friendly? And
15 whether and to what extent is that going to affect our share?
16 Is it going to make a difference?

17 So you know what they did, in 2007, they adjusted the
18 minimum rebate they can earn, that oncology clinics could earn
19 under the bundle. So even if you don't meet the hurdles of
20 that contract, even if you -- which we say is what really
21 drives the coercion, there is still enough rebates under the
22 new APC2007 for oncologists to break even. They're not going
23 to lose money on Medicare.

24 So they did make a change to their contract in
25 APC2007. And this is the analysis that led to a change that

1 they actually -- that actually happened. And that -- it's an
2 interesting point because it frames the issue that I think if
3 we step back from why we are looking for these documents, it
4 really demonstrates it.

5 What Amgen is saying, you can -- you can obtain
6 discovery of what our terms are, but you're not entitled to
7 understand the how or the why. Why and what extent was the
8 financial analysis done to come up with those terms? But the
9 how and the why are the essence of monopolistic intent. That
10 is a key element of the Sherman Act Section 2 claims.

11 We are entitled to discovery as to the analysis into
12 why Amgen adopted the terms that it did. You can't shield that
13 analysis merely by showing it to counsel. And if the
14 determination was to change your contract because you want to
15 make it more litigation friendly, that can -- that goes
16 directly to the monopolistic intent. We're entitled to
17 discovery of that.

18 So even though just one item brings up this
19 litigation point, you know, taking out -- that's still in my
20 mind, in our view, in our position, demonstrates exactly the
21 point we want to make.

22 Let me just point out one more because I think it
23 really jumps out to Your Honor. Number 19, conduct market
24 research on what is important to our customers currently. I
25 mean, what is important to our customers currently? That's

1 what the business concern is all about. Has nothing to do with
2 an attorney/client privileged communications.

3 And, Your Honor, under the precedent of this Court,
4 we've cited in our briefs, Johns Mansville, a Vioxx case
5 exactly on point. Merely having counsel in the room
6 particularly in the pharmaceutical arena, is not grounds for
7 obtaining protective privilege assertions. It just simply is
8 not. So that's the first document.

9 Second is -- are the two documents that were admitted
10 at deposition of Mr. Hansen. Now Mr. Hansen was a 30(b)(6)
11 witness for Amgen. So he's not testifying individual fact
12 capacity, but rather as a representative. And it was our --
13 the deposition we noticed that on October -- or me noticed in
14 September, but it was held on October 30th of last year. It
15 was the first deposition in the merit phase.

16 Why did we go first? Because we wanted to understand
17 what they did in 2007 because we've had no discovery on that.
18 So we needed to understand what was the strategy and what was
19 implemented.

20 So what we did is, I asked Mr. Hansen what was the
21 analysis that was done leading up to the contracts at issue.
22 On Page 147 of the transcript, you'll see that counsel
23 instructed his witness not to answer questions -- and do you
24 have the transcript, Your Honor?

25 THE COURT: Yes, I do.

1 MR. HAAS: Here it is. It's Page 147.

2 THE COURT: Okay.

3 MR. HAAS: "You know, in connection of the analysis
4 of APC2007 and the terms thereof, did Amgen run cost recoveries
5 for its drugs in Procrit utilizing ASPs that were calculated
6 under the proposed allocation rule?

7 "I can't divulge that information."

8 Asserting attorney/client privilege, right there. He
9 did it time and time again, and then they took a lunch break to
10 talk about it even further. Gave them the full opportunity to
11 consult with his counsel on the issue, Your Honor. And then we
12 came back from lunch, and on Page 155, he took the position
13 that I'm not -- I can't divulge that information because the
14 only analysis done on that issue, and that issue is a
15 reimbursement issue, it's referred in the parties' papers as
16 the bundle allocation rule or the CMS rule, or the MedPAC
17 issue. He took the position at that time, I can't testify
18 about it because it had nothing to do with our contractual
19 strategy. It was something that was done, you know, with
20 counsel. Had nothing to do with our strategy.

21 In fact, that's not true. You know that because they
22 submitted materials to CMS on this very issue. But just
23 sticking with the issue that's important for this case,
24 contractual strategy, I said, are you sure; are you sure that's
25 your position; you're sticking with it. And that's on Page

1 155.

2 And then I said, all right, well, let's go to the
3 documents. And those are the next two documents that I gave
4 Your Honor.

5 THE COURT: Okay.

6 MR. HAAS: It's the Exhibit 5 to our November 26,
7 2000 letter, and it's Exhibit No. 8 to the November 26, 2000
8 letter. There's two e-mails, both from --

9 THE COURT: One second.

10 MR. HAAS: Okay. You'll --

11 It's in the package I handed up to Your Honor to use
12 as reference.

13 THE COURT: Okay. Let me look in there.

14 MR. HAAS: It's just -- it's right after the one we
15 were just looking at?

16 THE COURT: Go ahead.

17 MR. HAAS: There's two more e-mails.

18 THE COURT: Yes.

19 MR. HAAS: But then they have the -- the exhibit tabs
20 from the deposition. Hansen Exhibit No. 9, and then it's
21 Hansen Exhibit No. 8.

22 THE COURT: I'm with you.

23 MR. HAAS: Now what are these e-mails? These are e-
24 mails both from December -- from 2006, late in 2006. They're
25 from Beverly Simmons, who was the head of Amgen's contractual

1 strategy group. It's to a series of people, including Fred
2 Manick (phonetic) who is the key person that was involved in
3 this strategic analysis.

4 And if you look at the language of the first one,
5 Hansen Exhibit No. 9, and I'll just read for you. It said,
6 "The decision was made to extend the current contract for one
7 quarter, so that we would be able to incorporate any relevant
8 learnings from the alternative contract strategy team that Mike
9 Ryan and Fred Manick are leading."

10 So they're deferring their strategy in order to
11 incorporate, incorporate this analysis.

12 Their -- "the team is close to bringing the analysis
13 of recommendations to closure. There is one more loose end
14 which will be the MedPAC recommendation relative to the CMS
15 issue of how rebates should be applied to the products in the
16 portfolio contract."

17 That is exactly what the witness was instructed not
18 to answer on Page 147. That's the issue. "It is expected that
19 this report will come out the second week of January, that
20 recommendation could impact our contract strategy."

21 So you have an analysis by this alternative contract
22 strategy team that is impacting contract strategy. That is
23 what we need discovery of. That's what this case is about.
24 The case is, what goes into your contracts? They were talking
25 about the APC2007. It's right up there on the top. The

1 APC2007 is the contract that's at issue in this litigation. We
2 allege it's coercive and anti-competitive.

3 So this is an analysis that we need to know, not just
4 what the terms are, but the how and the why. That's what this
5 analysis goes to. Instructing not to answer, showed him the
6 documents, said, well, doesn't this change your, you know, your
7 view? It says right here, done for contractual analysis that
8 came an answer, privileged.

9 Nothing we did had to do with the contractual
10 strategy. It was all separate privileged. No so. It's right
11 here in black and white, Your Honor.

12 Let's look at the next one. This is Hansen Exhibit
13 No. 8. Again, the top e-mail is from Beverly Simmons, head of
14 the contracting group to Fred Manick, the leader in this
15 strategic thinking. And the e-mail writes, below that says,
16 "as you can see from the message from Stewart and Cynthia, a
17 meeting has been scheduled for Jim." Jim Daly (phonetic), is a
18 senior executive at Amgen, "for next Tuesday to review clinic
19 contract options for '07." Again, subject matter is what are
20 we doing with our contract.

21 "At this time we should be looking at a couple
22 different scenarios that could drive different contracting
23 strategies. Point one, CMS position fee schedule, burdens
24 Aranesp with Neulasta and Neupogen."

25 Your Honor, that's the exact same issue. Once again,

1 they're considering the impact of that on their contracting
2 strategy. Simply want discovery of that issue. This was a
3 30(b)(6) witness.

4 I was seeking to determine how did that analysis
5 impact your contract? Simple issue, simple line of
6 questioning, was foreclosed from looking at that analysis.
7 It's our position that was entirely inappropriate.

8 So that's Fact No. 1. What was the plain reading of
9 what the document said?

10 Fact No. 2. Amgen has engaged in this same type of
11 analysis that's reflected in the in-camera document and in the
12 e-mails for 2004, 2005, 2006. And they produced that. When it
13 came to 2007, they said, hmm, let's shield it. Let's show it
14 to attorney, and so now we don't have to produce that? Now we
15 don't have to tell Ortho what our analysis was because we're
16 going to bring an attorney into the room? That's not
17 appropriate.

18 Your Honor, last night I went out and I just pulled a
19 document -- and if I may approach again, I'll show you just to
20 give you a flavor of what I'm talking about here. And there's
21 many, many documents on this, Your Honor. I just pulled this
22 out last night so we would have an example to look at. But if
23 you turn to Page 8, it's a page flagged for your reference.

24 This is a document that Amgen produced. It's part of
25 their strategic analyses that were done for its contract in

1 2004. And we've got documents from 2005 and 2006 and I can
2 produce those as well. But if you turn to Page 8, it's develop
3 -- I'm looking at the bullet -- second bullet point for
4 example.

5 "Develop strategy in detail to plan to grow. To grow
6 Aranesp share in MCO retail business." Again, contemplating
7 developing a strategy to grow retail business.

8 "Influence MCO transition to ASP reimbursement and
9 position Aranesp favorably." Again, same issues. They're
10 talking about how for contract purposes can we improve
11 Aranesp's position.

12 If we look at the last bullet point.

13 "EPO, develop optimal strategy, timing, triggers in
14 plan for potential ESRD conversion to Aranesp in 2004 and
15 2006."

16 That's the exact same issue as Number 10 on the in-
17 camera document. That's the exact same thing. They're looking
18 to say, you know, I described to you earlier, Your Honor,
19 should we convert the ESRD segment to Aranesp, and will it
20 benefit and implications for oncology, exact same issue.

21 "Develop optional strategy and planning for managing
22 downside risk of proposed reimbursement changes in 2005."

23 The same issue as Number 2 on the in-camera list.

24 There's a -- I can submit a panoply of documents
25 demonstrating the exact same type of financial analyses done

1 every year in the regular course of business at Amgen for its
2 contractual strategy.

3 That's for 2007, we don't get to inquire about that?
4 You see, this is vitally important, Your Honor, and the reason
5 why we can't otherwise determine this is because the discovery
6 cutoff was December 31st, 2006. I don't have the documents. I
7 don't have these to be able to go to another source. I have to
8 rely on their 30(b)(6) witness and I was cut off. I don't have
9 the discovery I need in order to fully make out my argument.
10 So that's Fact No. 2.

11 Fact No. 3, Amgen fully understands this is
12 information that is used in the regular course of business and
13 is fully discoverable. How can we show that? Simply. Let's
14 look at their very own discovery demands.

15 Your Honor, I've given you two documents here, both
16 of discovery demand made by Amgen. First is a subpoena to a
17 third party. The third party they subpoenaed was an entity
18 known as CRA that conducted analysis on Ortho's behalf.

19 So if you look at Request No. 18 of this first
20 demand, and I'll give you the page number. It's Page 8. It's
21 the very last page before the --

22 THE COURT: Uh-huh.

23 MR. HAAS: -- yellow slip. Demand to CRA, Ortho's
24 agent in some respects in this regard.

25 "All documents concerning any efforts by you, Ortho,

1 or any other person to determine the affect on Procrit sales or
2 red blood cell grow factor sales, generally of any of the
3 following market events: One, the issuance of in January 2007
4 of the Medicare Payment Advisory Commission's report entitled
5 'impacted change in Medicare payment on parts to be dry.'"

6 That's the MedPAC, the Medicare Payment Advisory
7 Commission, that's MedPAC.

8 THE COURT: Uh-huh. Uh-huh.

9 MR. HAAS: So we saw that reference earlier, same
10 thing. They're demanding from us the same analysis that we
11 sought discovery of them. They said, no, you can't get it
12 because it's attorney/client privilege. It's not. It's
13 regular course of business financial analysis used for the
14 business. It can't be shielded simply because you bring an
15 attorney into the room.

16 Second and third issues are the same, Your Honor.
17 CMS proposed adoption of an allocation of price concession of
18 drugs under a bundled arrangement. Same language as in the
19 earlier documents we looked at, Your Honor, for the purposes of
20 calculating ASP. So that's their request to our agent.

21 More recently, Your Honor, Amgen just commenced
22 depositions with this fairly extensive 30(b)(6) notice, and if
23 you would look among the 20 topics -- I don't know if you could
24 call it the most narrow request -- but if you would look at
25 Topic No. 11, again, it's almost a mirror image request. Now

1 they're seeking testimony of our witnesses, our 30(b)(6)
2 witnesses.

3 Really ironic, Your Honor. When I asked the question
4 of their witnesses, I get cut off. They're asking the same
5 thing from my 30(b)(6) witness? From Ortho's 30(b)(6) witness?
6 It's the exact same wording. "All efforts by Ortho to
7 determine and forecast the effect or potential effect on
8 Procrit sales or red blood cell grow factor sales generally of
9 any of the following events:

10 "One, the issuance in January 2007 of the Medicare
11 Payment Advisory Commission report, the MedPAC report.

12 "Two, CMS's proposed adoption of an allocation of
13 price concession on drugs sold under bundled agreement."

14 Your Honor, the exact same query. They fully
15 understand work that done in the regular course of business for
16 developing contracts and contract strategy. It's a very
17 central issue in this case. And we would submit that it should
18 be deemed discoverable and Amgen should be ordered to produce
19 the information.

20 THE COURT: Okay.

21 MR. HAAS: Thank you, Your Honor.

22 THE COURT: Thank you, Mr. Haas.

23 Mr. Griffinger.

24 MR. GRIFFINGER: Mr. Whitney will present this
25 argument, Your Honor.

1 THE COURT: Thank you.

2 MR. WHITNEY: Good morning, Your Honor.

3 THE COURT: Good morning.

4 MR. WHITNEY: Your Honor, there's three simple
5 reasons why Ortho's motion to compel should be denied. First,
6 Amgen's privilege assertions were very limited in scope. Two,
7 they have been fully supported by sworn testimony of two senior
8 executive contracting personnel at Amgen. And, three, they are
9 entirely consistent with the governing law of this circuit.

10 In Mr. Haas's presentation, he's attempting to ignore
11 entirely the sworn testimony and the evidence we have presented
12 in support of our privilege assertion. He did not once mention
13 the very detailed affidavit or declaration of Fred Manick which
14 sets forth in very careful detail the creation of the document
15 that Mr. Haas is challenging.

16 And the reasons why it was created; namely, for the
17 purpose of seeking legal advice from Amgen's inside and outside
18 lawyers regarding potential regulatory changes, potential
19 competitive responses, and the impact of those potential
20 changes on a number of legal issues, including the instant
21 litigation.

22 The testimony of Mr. Hansen and the testimony of Mr.
23 Manick are clear, they're unequivocal, they're consistent, and
24 they're uncontradicted that the analysis Mr. Haas is seeking,
25 contrary to his repeated assertions, did not, Your Honor,

1 impact in any way the terms of APC2007, the contract that is
2 now at issue in the litigation and the contract about which Mr.
3 Hansen was the 30(b)(6) deponent.

4 In terms of the first issue, Your Honor, the scope, I
5 think it's important to put a little context around this
6 deposition of Mr. Hansen and the contracting scenario
7 generally. Mr. Hansen was designated as the 30(b)(6)
8 representative of Amgen for the structure and development and
9 implementation of APC2007, Amgen's latest contract. That
10 contract was developed and approved by the pricing committee in
11 May of 2007, and it was implemented in the marketplace in July
12 of 2007.

13 The events at issue here about which Mr. Haas is
14 submitting documents, relate to various contingencies occurring
15 during the course of 2006. There were two primary
16 contingencies that Amgen was facing in 2006. One was, what
17 would happen if Ortho prevailed in this litigation? What
18 impact would that have on Amgen's contracting strategy? And as
19 you might imagine, Your Honor, Amgen sought legal advice
20 regarding that issue. That occurred during the summer of 2006.
21 As you may know, this case went before Judge Chesler for a
22 preliminary injunction hearing in June of 2006, and the ruling
23 came down in the fall of 2006.

24 The second contingency, Your Honor, is the
25 announcement in October of 2007 by CMS which is the government

1 agency responsible for setting reimbursement for the drugs at
2 issue in this case.

3 In October of 2007, CMS addressed an issue that Ortho
4 had been extensively lobbying on. And that is whether or not
5 discounts in a bundled contracting arrangement should affect
6 the rates of reimbursement for all of the products within the
7 bundled contracting arrangement.

8 So the second contingency Amgen's faced in the fall
9 of 2007 was, what if Ortho and its lobbyists prevailed on that
10 front and CMS actually adopted a policy shifting the discounts
11 in that regard? Recalculating or reallocating the
12 reimbursement rate from one product to the other?

13 CMS did not act in October of 2007, and in fact did
14 not act any time prior to the launch of APC2007 in July of
15 2007. No action was taken on this issue.

16 So what you have, Your Honor, is Amgen at that time
17 addressing a contingency of Ortho and their lobbyists
18 prevailing on CMS down the road and winning and obtaining a
19 rule or a regulation or a program change that would have
20 required the reallocation of discounts.

21 They sought legal advice on that issue as you might
22 expect. How such a regulatory environment might affect
23 potential competitor responses of Ortho and of Amgen. How
24 those competitive responses might be viewed in the new
25 regulatory environment. Legal issues relating to those

1 competitive responses including, of course, the impact on the
2 instant litigation, which as you noted is referenced on a
3 number of occasions in the document itself.

4 THE COURT: Mr. Whitney, let me just ask you a few
5 questions here.

6 The advice or the questions being posed, are those
7 legal questions or business questions? Are you saying that the
8 Amgen personnel here were seeking information and advice with
9 regard to what would happen legally, or are we saying what
10 approach should we approach as a business strategy? Because
11 they're two very different questions in my mind.

12 MR. WHITNEY: You're absolutely right in framing the
13 question that way, and the answer is clear. They were asking
14 legal questions. They were asking the legal team at Amgen,
15 what -- what would the legal implications be of certain
16 competitive responses? They weren't asking the legal team to
17 come up with competitive responses. This is an extremely
18 dynamic, it's an extremely complicated competitive environment
19 made complicated by the reimbursement scheme, by the nature of
20 the purchases, and the competition.

21 It is, I can say personally, extremely difficult to
22 understand as an outsider, as a lawyer all the nuances that go
23 into the competitive decision-making. It is imperative as Mr.
24 Manick sets forth in his declaration that lawyers have that
25 nuance understanding of what exactly is going on in the

1 marketplace, what could change in the marketplace, how the two
2 competitors could respond to one another, in order to be able
3 to give informed intelligent and useful legal advice.

4 And it is clear, and Mr. Manick's declaration that
5 Mr. Haas ignored entirely throughout his lengthy presentation.
6 It's Exhibit 4, and I can hand up another copy for Your Honor.

7 THE COURT: I've reviewed it at length.

8 MR. WHITNEY: It makes perfectly clear, Your Honor,
9 that the purpose of all of the analyses set forth in the
10 document that Mr. Haas referenced, was in fact performed for
11 the purpose of educating the lawyers about potential
12 competitive responses and a listing from the lawyers, legal
13 advice about the potential implications of engaging in any of
14 those scenarios set forth on this document. The legal
15 implications of that, how that could affect, among other
16 things, the instant litigation.

17 You noted litigation's referenced in Line 11. It's
18 also referenced in Item 4. But the bottom line here is, the
19 lawyers couldn't understand the dynamics of the marketplace
20 without being presented this information. And what Mr. Manick
21 says and what in fact happened despite Ortho's refusal to
22 acknowledge it, is that Amgen said when this rule came out and
23 they -- and what the team said was, we're looking at the issue.
24 There's a potential down the road that we may act on this
25 issue.

1 So what Amgen said, we need to figure out if they do
2 act, what would it look like, what could we do, what might
3 Ortho do, and is any of that going to impact the legality of
4 our contracting arrangement? And the impact to this -- the
5 course of this litigation.

6 So they put together a team of business people and
7 legal people to provide a forum where information could be
8 shared confidentially from business people to legal people, to
9 elicit, to, one, inform the legal personnel about how this
10 would have worked; and, two, elicit from the lawyers their best
11 informed judgment about whether or not any potential
12 competitive responses would impact the legality, any legal
13 issues relating to Amgen's contracting scheme, or could impact
14 this litigation.

15 And Mr. Haas ignores the fact that Mr. Manick in his
16 declaration of Paragraphs 17 and 28, and Mr. Hansen in his
17 testimony repeatedly stated in no uncertain terms that this
18 analysis, this hypothetical potential analysis done solely for
19 the purpose of getting the lawyers up to speed in getting legal
20 advice in return was not used in developing the terms of APC07.

21 And if -- Mr. Haas referenced Mr. Hansen's deposition
22 transcript. If you look at Page 155, his testimony could not
23 be more clear on this point. Although he repeats it several
24 times in response to several questions from Mr. Haas, but he
25 says, the analysis of the proposed CMS bundle allocation was

1 not done for the purposes of the APC07 contract. And it did
2 not affect the terms of the APC07 contract.

3 And, Your Honor, there's a simple reason for that.
4 There was no reallocation change that occurred prior to the
5 development, the approval, and the launch of APC2007 all of
6 which occurred by July of 2007 by which time CMS had not in
7 fact acted to reallocate any discounts for the purposes of
8 calculating reimbursements of the various drugs.

9 So what Mr. Haas is trying to do here is, take the
10 issue completely out of context. He's also trying to take the
11 deposition entirely out of context.

12 Mr. Hansen was designated solely to testify about the
13 development of APC2007. He sat for seven hours. There's over
14 300 pages of his transcript. He did not refuse to answer a
15 single question about APC2007. He testified about its
16 structure. He testified about its development. He testified
17 about its implementation. We've produced the initial pricing
18 committee dec from November of '06 regarding APC2007. We've
19 produced the final pricing committee dec from May of 2007 which
20 included all the business analytics related to the development
21 of APC2007.

22 Mr. Haas did not ask a single question regarding
23 APC2007, as opposed to these two other contingencies that
24 counsel either instructed Mr. Hansen not to answer, or that in
25 fact Mr. Hansen did not fully answer as Amgen's representative.

1 In essence, Mr. Haas is trying to compel testimony
2 that doesn't exist. He's trying to ignore the uncontroverted
3 testimony of two Amgen individuals, the one who implemented
4 APC2007, and the one responsible for the entire contract and
5 pricing department that both stated in no uncertain terms, that
6 the contingency analysis that Mr. Haas is talking about did not
7 in fact impact and was not used to develop the terms of
8 APC2007.

9 THE COURT: Mr. Whitney, can you address for me Mr.
10 Haas's point with regard to Mr. Hansen being precluded from
11 answering a question that was specifically speaking to the
12 contract strategy? And I believe it was in response to a
13 question from -- or an e-mail from Mr. Hansen's boss that was
14 dated December 7. It was in the transcript, and Mr. Haas
15 raised it in his opening argument, and I was particularly
16 concerned or wanted to know more about the instruction there,
17 and the answer why he couldn't answer that?

18 MR. WHITNEY: I believe, Your Honor, just so the
19 record is clear, that you're referring to what was marked at
20 Mr. Hansen's deposition as Exhibit 9. Is that correct?

21 THE COURT: No. I believe it was Exhibit 5. Let me
22 just find it first and I'll lead you to the precise area.

23 MR. HAAS: To help you out, that, Your Honor, it's
24 Exhibit 5 to the November 26th letter and it is Exhibit No. 9
25 to the Hansen exhibit.

1 THE COURT: Okay.

2 MR. HAAS: So you're both right.

3 THE COURT: Thank you.

4 MR. WHITNEY: Thank you, Mr. Haas.

5 MR. HAAS: For the record did help, Judge.

6 MR. WHITNEY: In connection with this e-mail, what
7 this e-mail states from Beverly Simmons is that the work being
8 done on the alternate contract strategy team could -- could
9 impact the development of APC2007 because at that time no one
10 knew whether in fact CMS was going to act and reallocate the
11 discounts prior to the launch of APC2007.

12 And it says, it refers to potential relevant
13 learnings from this contingency analysis centered around the
14 potential future action of CMS.

15 Well, obviously if CMS acted, then that relevant --
16 that analysis might later become relevant to the development of
17 the contract. In fact, we know CMS did not act prior to the
18 launch of APC07, so there was no relevant learnings, in the
19 terms of Miss Simmons, to be used in the development of Amgen's
20 contract. And that's exactly what happened and that's what Mr.
21 Hansen testified to.

22 His testimony is clear on several points in the
23 transcript, Your Honor, that key -- none of the analyses
24 regarding the CMS bundled reallocation that may be referred to
25 here by Miss Simmons was used at all for the purposes of

1 developing APC2007. So any analysis done in that group as set
2 forth clearly in Mr. Manick's declaration was done solely to
3 receive legal advice regarding potential and future competitive
4 responses if and when CMS were to act in the future regarding
5 the reallocation of the discounts.

6 Does that answer your question, Your Honor?

7 THE COURT: I think I'm well on my way to getting
8 there, sir. Thank you.

9 MR. WHITNEY: In terms of -- a couple of points I
10 just want to highlight regarding Mr. Manick's declaration. And
11 just to make it clear that we have satisfied the elements of
12 privilege under the law of this circuit. And for that I think
13 in the papers submitted to the Court is set forth in Ford Motor
14 Company case, (3rd Cir. 1997), which I'm sure you're familiar
15 with. And, again, Ford Motor states very clearly, that it's
16 not the form of any analysis that governs the relevant inquiry.
17 In that case, the District Court refused a privilege claim
18 because it found the documents at issue related to business
19 matters or purely factual matters.

20 The Third Circuit reversed that refusal to honor a
21 privilege claim in that circuit and rightly found that the
22 inquiry is not what the document looks like or what's contained
23 in the document, but why the document was created and why the
24 analysis referred to in the documents wasn't -- was
25 contemplated at all.

1 And there's only one reading of the record we have in
2 this case before Your Honor with Mr. Hansen's testimony and Mr.
3 Manick's declaration and that is, all of the analytics
4 referenced in the document, even though they clearly relate to
5 business matters, Mr. Haas was right about that. But the
6 analytics were done in that case for the purpose of seeking
7 legal advice. And whether you apply Ford Motor, or you apply
8 the test in Vioxx, you apply the test in any case, the fact
9 that legal advice and the desire to get legal advice motivated
10 the creation not only of that document, but the running of
11 those analytics make them privileged.

12 THE COURT: If analytic -- let's just move away from
13 the facts here, for just a quick second.

14 If a company puts together a business plan every
15 single year and on a given year, they decide to run their
16 business plan by their legal department to inquire from the
17 legal department whether or not this is a sound business plan,
18 if there are any potential liabilities here, just to elicit
19 some legal advice, does that then make that document
20 privileged?

21 MR. WHITNEY: In the scenario you just described,
22 Your Honor, it doesn't sound like it to me because they would
23 have created that business plan even if they weren't concerned
24 about getting legal advice. That's very different here because
25 this contingency came about and Amgen said, we need to get

1 legal advice on the potential ramifications of the contingency,
2 and then engaged in this analysis.

3 It's very different. Mr. Haas is trying to draw a
4 comparison back to earlier contracting analysis.

5 THE COURT: Uh-huh.

6 MR. WHITNEY: It's an entirely different animal here
7 because we have a contingency that did in fact occur prior to
8 the launch of the contract.

9 In earlier documents he referenced, the regime change
10 in reimbursement, A, was certain; B, there weren't nearly the
11 legal issues at play in that respect. That was pre-litigation
12 obviously. It was pre-ruling in this case.

13 So this was a unique situation because there was a
14 unique contingency and a unique desire to get analysis from the
15 legal department on that contingency.

16 THE COURT: Okay.

17 MR. HAAS: Your Honor, may I make two quick points?

18 THE COURT: Let me --

19 MR. HAAS: I'm sorry. I thought you were done.

20 MR. WHITNEY: In terms -- and, again, I just want to
21 make the record clear as to what Amgen has produced in
22 conjunction with APC2007. Amgen has produced all the business
23 analytics that were called for pursuant to the cutoff deadline
24 in this case. It has produced a 30(b)(6) deponent. It has
25 provided full testimony on that. It provided initial

1 contracting ideas for APC2007 in August 2007, in November --
2 August 2006, rather. November of 2006, provided the final
3 pricing committee dec in May of '07. Provided the final
4 contracts. It provided -- it has not withheld any documents
5 relating to the development and the structure of APC2007. And
6 I think that it's important that the record be clear on that,
7 despite arguments of counsel.

8 So I think basic -- on the record before Your Honor,
9 there, again, is only one conclusion, that the document and the
10 -- that Mr. Manick created, was created for the purposes of
11 seeking legal advice. Under the law of this circuit, that
12 document is protected.

13 Similarly, Mr. Hansen's limited -- the limited
14 instructions at Mr. Hansen's deposition to refrain from
15 divulging attorney/client privilege, and that was all that was
16 done. And they're very few in the course of the seven-hour
17 deposition were properly made because the two contingency areas
18 about which he said, the analytics were protected. Each of
19 those scenarios, one, was run for the purpose of seeking legal
20 advice regarding the impact on this litigation; and, two, did
21 not affect the final terms of the contract which Amgen has
22 fully produced.

23 Mr. Haas cannot now sit here and complain about the
24 discovery cutoff he, himself, proposed and agreed to. That is
25 not the fault of Amgen, and it certainly insufficient to

1 undermine are legitimate, are well supported and are judicious
2 privilege claims.

3 THE COURT: Okay.

4 MR. WHITNEY: Thank you very much, Your Honor.

5 THE COURT: Thank you.

6 Mr. Haas, I'm -- you're invited to make a few
7 comments, but we do have other arguments to get to, so I'm
8 going to --

9 MR. HAAS: Two short points.

10 THE COURT: -- urge you to move along.

11 MR. HAAS: I'll be -- I'll be very brief, Your Honor.

12 THE COURT: Sure.

13 MR. HAAS: You asked whether there were legal
14 questions presented by the document, Mr. Whitney focused on the
15 CMS issue. But just to make sure we're absolutely clear, if
16 you look at 7, "What is the impact of casing top accounts, if
17 you assume competition with -- countered with added discounts?"
18 That has nothing to do with a legal issue. It's a business
19 analysis we looked at before. The "what is the impact on our
20 customers?" That's a business issue.

21 The test, Your Honor, is a but for test. Wouldn't
22 the analytics be done but for the legal advice? The answer is,
23 yes. These are all business and analytics. Even the CMS
24 proposal letter.

25 And how do you know that? Two things, first of all,

1 they did submit a proposal to the CMS. They did lobby against
2 this change. They had to do the analytics anyway. That's
3 number one.

4 Number two, they're asking for the same thing from
5 us. It's the type of analysis that they fully understand is
6 discoverable.

7 The second thing Mr. Whitney said that was import
8 that this had no impact on contract strategy, going back to the
9 e-mail that we looked at, it says right on the face, this --
10 the e-mail that he just referred to which is Exhibit 5 and the
11 Exhibit 9 to the Hansen deposition. The decision was made to
12 extend the current contract for one quarter. To incorporate
13 the relevant learnings from the alternative contact strategy
14 teams.

15 It had an impact on contract strategy. That's why
16 they want to know how it impacted ours. We had documents
17 through December 26, 2006. Nobody's disputing the cutoff date.
18 We're merely seeking to get the discovery we need through
19 30(b)(6) testimony in order to properly litigate this case.

20 Thank you, Your Honor.

21 THE COURT: Okay. Let's move to the final two
22 arguments. I want to hear them together from both sides. And
23 those arguments relate to the dispute regarding which party
24 should bear Amgen's costs associated with the review and
25 production of documents from Amgen's disaster recovery tapes,

1 as well as the dispute regarding the potential extension of
2 discovery time.

3 MR. HAAS: Okay. Thank you, Your Honor.

4 With respect to our motion to compel the backup tape
5 discovery, Your Honor, Amgen is making an unprecedented
6 position. Amgen is taking the unprecedented position that
7 Ortho should bear the cost of its attorneys' review of
8 documents that have already been converted from inaccessible to
9 accessible format. There has been no Federal Court decisions
10 that we have found, and we have looked that has shifted the
11 cost from the respondent to the requester as a condition of
12 receiving information from backup tapes.

13 Quite to the contrary, the cases that have looked at
14 that issue have said in some circumstances it may make sense to
15 shift the cost of converting inaccessible data to accessible
16 format in some circumstances.

17 In the Zuba Lake (phonetic), of course Your Honor
18 knows is the seminal decision there, and the Court goes through
19 a number of factors and they weigh things such as, you know,
20 what is the wherewithal of the individual to actually pay for
21 them? And so in some circumstances, they say it's a big
22 corporation, from any backup tape from a little company that
23 you're going to have to pay the cost of converting. But in
24 those same cases, the Courts are clear, under no circumstances.
25 That's the wording in the cases. Under no circumstances are

1 attorneys' review costs to be shifted. Under Federal
2 jurisprudence, the rule is, each party bears the cost of its
3 own attorney/client attorney review of its own documents.

4 Now consistent with the Federal rules, the parties
5 agree, they also have an agreement here. So we have the
6 Federal rules and we have an agreement that the only costs that
7 are going to be shifted are the recovery costs, and that's
8 Exhibit B to our letter.

9 Exhibit C to our letter demonstrates that Amgen fully
10 understood that that did not include attorney review costs.
11 Attorney -- Exhibit B was an itemization by Mr. Walsh of what
12 the cost Ortho had to bear in order to get these documents.
13 Now this is the beginning of the process.

14 So we said, what -- what is this going to cost us?
15 And we started with a large number of tapes. We brought it
16 down to one. We brought it down to one that was created before
17 this litigation started because we wanted documents that were
18 kept in the regular course of business before the inception of
19 the litigation. So we brought that all down and we said, how
20 much is this going to cost? And there was an itemization of
21 all of the costs involved, that itemization did not include
22 attorney review cost. Consistent with the Federal rules,
23 consistent with our stipulation which is in Exhibit B, that
24 itemization has had nothing, nothing about attorney review
25 costs being shifted from Amgen to Ortho.

1 But twice thereafter, and that's Exhibit D and E to
2 our papers, that agreement was amended because Amgen said,
3 well, we want you to pay for something else; we want you to pay
4 for something; well, we made a mistake, we left something out
5 in the first one. And so you might see it in the papers, they
6 asked for kid glove service, for example, the cost of shipping
7 the tapes from one office to another, even though every single
8 paper of the other 50 million pages of documents in this case
9 has been sent by fed-ex in a CD, they said, no, no, no. In
10 order to get your backup tapes, we have to have a security
11 officer with white gloves they call it. It's the white gloves
12 office service and they'll ship it by a security car from one
13 site to another. Fed-ex wouldn't suffice.

14 But it was of the amount which would have cost more
15 for us to litigate it and to avoid bringing unnecessary issues
16 to Your Honor, we said, okay, we'll pay for that. But this is
17 too far. They have now asked for us to pay for the attorney
18 costs, their own attorneys' review of documents as a condition
19 of producing documents we're entitled to, highly relevant, it
20 was agreed from day one that the parties would retain this
21 document in order for it to be produced, we stipulated exactly
22 what it was that we were to produce and the Federal Rules of
23 Evidence are clear -- that Federal procedures are clear, there
24 should be no shifting of attorney review costs in order to get
25 that which you're entitled to.

1 So we respectfully submit that Amgen should bear its
2 own costs. These documents that are already converted should
3 be treated like every single one of the 15 million pages that
4 have been produced. Amgen should bear its own costs and should
5 produce the documents, so we can move forward with the
6 litigation.

7 Thank you, Your Honor.

8 THE COURT: Okay. Please address also at this time,
9 Mr. Haas, the proposed extension of discovery at the time, or
10 discovery time.

11 MR. HAAS: Your Honor, the last time we were in
12 chambers, I went through the whole history of the case. I'll
13 run through that again for you.

14 THE COURT: Thank you.

15 MR. HAAS: But my point there was, enough is enough.
16 I think that's where I left off. Is that we've been litigating
17 this case for three years, we've gotten endless, endless
18 discovery, but just to squarely put a little coin on it, we
19 were just dealing with this issue in October. We were before
20 Magistrate Falk, Amgen said, we need a six-month adjournment of
21 the trial schedule. Six months adjournment premised on the
22 fact, well, there's been a delay in the discovery production.
23 We need additional time for the documents that are to be
24 produced up to the end of October. The custodian files, we
25 need to have more time to review those, and Magistrate Falk

1 said, you guys go back, solve your redaction issues and don't
2 bring them to the Court, solve them and produce them. And
3 Amgen said, well, we need to be able to review those too.
4 Right? That was in October.

5 So they moved the schedule six months and adopted the
6 schedule Amgen proposed on that premise. Nothing has changed
7 since then that militates an adjournment of this schedule. We
8 have -- Ortho has complied fully with the agreement. As of
9 October 31st, we discussed this last time, we've produced 30 --
10 the files of 30 out of 31 custodians, over 11 million pages.
11 There was one custodian that they discussed. His family had a
12 death in the family, he moved, his computer crashed, perfect
13 storm, but that was one. It was produced by the end of the
14 time, by the way.

15 But 30 and 31 custodians. All of that was requested
16 by the end of October. Then we unredacted documents and we
17 listened to Magistrate Falk and we had indeed, we got the
18 letter from opposing counsel, said, well, you're producing
19 documents that say redaction all over it. Said, well, the
20 Magistrate Falk said, go back. You better be darn sure that
21 you're not standing anything that shouldn't be redacted. So we
22 just unredacted those. If there was a question, we pushed it
23 out.

24 We did what we were supposed to. Amgen took a
25 different tact -- oh, and by the way, the other thing he did,

1 we commenced depositions on October 3rd. Amgen did unredact
2 the documents and since we have the issue that's going to come
3 up before Your Honor now. And we're going to have other
4 redactions because --

5 In any event, they didn't unredact. They didn't
6 commence depositions. They didn't commence depositions in
7 October when we did. They waited until a couple weeks ago.

8 But the unilateral election not to proceed with
9 discovery is not grounds for adjournment. They have had more
10 than enough discovery since October 2007 to proceed with this
11 case. Nothing has changed since. Everything is going
12 according to the schedule that they proposed.

13 Your Honor, we would strongly urge that there be no
14 adjournment at trial, so that we can get this case tried this
15 year. That's what the schedule calls for.

16 THE COURT: Thank you.

17 MR. HAAS: Thank you, Your Honor.

18 THE COURT: Mr. Griffinger.

19 MR. GRIFFINGER: Good morning, again, Your Honor.

20 THE COURT: Good morning.

21 MR. GRIFFINGER: I'll address the disaster recovery
22 tape issue first. And you have letters on that.

23 I do have a handout, if I may approach?

24 THE COURT: Sure.

25 MR. GRIFFINGER: It's sort of lays out in a little

1 bit more detail in color.

2 THE COURT: Thank you.

3 MR. HAAS: Thank you.

4 MR. GRIFFINGER: And there's a history on this, and
5 that's why I've taken the time or our team has taken the time
6 to put together this little flow chart for Your Honor, and I
7 think it tells a very compelling story.

8 What is this about? This is about litigation -- pre-
9 litigation disaster recovery tapes. In other words, tapes that
10 were prepared at Amgen before this litigation was begun in late
11 October of 2005.

12 At the outset of the case, we set aside as we say
13 there about 14,000 disaster recovery tapes. Ortho said, well,
14 we want three days of your disaster recovery tapes and we
15 estimated that at approximately 3,000 tapes. And we told them
16 as we told Your Honor in one of our letters that our estimated
17 cost at that time was about a million dollars. And we said,
18 but we can help you out on this. We can make life a little
19 simpler for you because we have what are called catalogue
20 tapes, which I understand are something like a table of
21 contents or an index. So that would enable you if we restore
22 those for you, which were also disaster recovery tapes, you can
23 take a look at those and decide which tapes you want, so we can
24 really narrow the universe. And we did that for them and they
25 said, that's good; please do that. They wanted to save money

1 too. So we sent them over to Renew Data, and we restored the
2 catalogue tapes at a modest cost as you can see, of under
3 \$10,000. And we gave them to them. And then they said, okay,
4 thank you, that's helpful. We want the October 8 tapes. We
5 said, all right, let's see what that's going to entail.

6 So we looked and we found that there were 855 tapes
7 from October 2005 that contained files belonging to these 21
8 custodians that they wanted. And relying on that, our
9 analysis, Ortho said, all right, here's what we want. We want
10 24 of your disaster recovery tapes. And as we say, it took us
11 about 240 person hours just to get to this stage for which, of
12 course, we're not charging them.

13 So we get the 24 disaster recovery tapes, we send
14 them over to Renew Data to be restored. Now you'll see a
15 footnote there. I think it gives you a sense of the scope of
16 this matter. Footnote says that each disaster recovery tape, I
17 have one here, demonstrative evidence, that each contains 50
18 gigabytes of data. And based on our estimates, 50 gigabytes
19 represents approximately 1.2 million electronic files. That's
20 a lot of electronic files. Those are like e-mails or word
21 processing.

22 And so we restored them. We restored them again and
23 Renew Data charged \$41,000 for that. A total so far of
24 \$50,000. And by the way, Ortho said, we'll pay for that. They
25 haven't to the best of my knowledge sent a check yet, but we

1 understand that they have committed to pay for that.

2 Well, that's where we are. By the time Renew Data
3 finishes restoring the disaster recovery tapes.

4 What's remaining to be done to give Ortho what it has
5 requested, we have to go to Epic. As you can see on the chart,
6 they have to process the data, run keyword searches. Once
7 again all designed to try to narrow down the universe of
8 information that's going to ultimately be turned over to them.
9 And keyword searches, privilege filters, try to identify
10 duplicates.

11 And then what we do, we have to turn those documents
12 over to the Amgen attorneys because they have to be reviewed
13 for responsiveness to document requests, for privilege, for
14 confidentiality, and for any necessary redactions. It's got to
15 be done. It's been done by them with their document
16 productions, but done by us. It's an absolute necessary step
17 to accomplish what they want.

18 Have they demonstrated unlike so many of the cases,
19 the federal cases, I note Mr. Haas did not rely on the key New
20 Jersey State Court case that we've cited, the Delta Financial
21 case, but all those cases talk about spoliation. They talk
22 about missing e-mails. I'm sure Your Honor's familiar with all
23 this electronic litigation that goes -- electronic ESI
24 litigation that goes on. It really relates to, are we getting
25 your documents or are we not? Have you done something? Have

1 you destroyed them? Are they missing? Are they in some
2 fashion unavailable to us? And if that's the case, yeah. Then
3 we're not going to -- we, the seeker of the documents, are not
4 going to pay you for something you've done wrong. But here
5 there has been no suggestion, no showing of anything. In fact,
6 we've said, we think a lot of these things to be duplicates.
7 Many I'm sure will be. But they want them, so all we're asking
8 is that they pay for them.

9 And that includes the attorney review, that includes
10 the final step that you see on the chart there, that Epic has
11 to convert these files into TIF images, Bates number them,
12 designate them confidential if the attorneys say that they are,
13 load them up and produce them to Ortho. It's an expensive
14 process. We don't know what the costs of Epic are going to be
15 or what the attorney time is going to be. We've done our best
16 to very, very selectively assist in narrowing the universe of
17 documents that they have requested. But this is their request,
18 not our wrongdoing. No showing of anything improper.

19 So for that reason, we want to be reimbursed for the
20 costs that we are incurring for achieving the result that they
21 have requested. And I think as I said, the Delta Financial
22 case makes it clear. I think we put that into our
23 correspondence.

24 And one other thought and that is, do we ever waive
25 the concept of attorneys' fees as Mr. Haas suggested, Mr. Walsh

1 in his correspondence said, all -- all we want are certain
2 costs. The answer's no. In fact, on April 30th we wrote to
3 Mr. Wang of the Patterson Belknap firm and said, this is going
4 to be a substantial burden on Amgen. It will require Amgen to
5 pay attorneys to review for responsiveness and privilege
6 hundreds of thousands of pages of documents. The result of
7 that effort likely will be the production of no new documents,
8 or if any, a very small number of new documents. That's true
9 then in April of 2007. It's true today. They knew there was
10 no waiver. There is no suggestion that we were in any way not
11 going to incur a cost that we sought reimbursement for for the
12 attorney review.

13 That concludes my discussion of disaster recovery
14 tapes situation, Your Honor.

15 Now let me talk about scheduling. And I'm going to
16 go on a little bit longer than Mr. Haas, if Your Honor will
17 indulge me because I think there is good reason to give Your
18 Honor a good context on this.

19 When Mr. Timpone and Mr. Haas wrote to Your Honor on
20 December 10th, two days before our conference, they wrote,
21 "Virtually all of Ortho's production was complete by October."
22 And they go on, "with the limited exception being Ortho's
23 responses to Amgen's related incremental and overbroad demands
24 designed solely to contrive grounds for delay" blah, blah,
25 blah.

1 Mr. Haas talked about the perfect storm. I
2 understand that situation with the one custodian, but the
3 operative language here is telling Your Honor, "Virtually all
4 of Ortho's production was complete by October."

5 Well, let's take a look, if I may hand up what has
6 occurred since October. This chart is in reverse chronological
7 order from the second page reading up from the bottom, other
8 than the CRA matter, which I'll talk about in a minute, we show
9 what has occurred since October.

10 And just scanning the chart that I've handed up, Your
11 Honor can clearly see what production we have received since
12 October. Including last Friday, another 136,000 documents, the
13 very first item on the first page. And some documents we don't
14 even know how many pages there are, but the documents we've
15 gotten from Ortho since October, three-quarters of a million in
16 pages and disks and other format.

17 CRA. CRA is Charles River Associates. I don't know
18 if Your Honor is familiar with them. They are a consulting
19 firm out of Boston. Ortho relies very heavily on CRA in doing
20 all their contracting and strategizing about how to compete.
21 And, of course, this case is about competition.

22 So we have Charles River Associates documents which
23 in fact in the preliminary injunction phase we saw many, giving
24 them strategy; here's what you should do to counter Amgen;
25 here's our advice. And they generally follow it. So CRA is a

1 very important third party here.

2 Patterson Belknap represents them with respect to the
3 subpoena that we served upon CRA because we want their
4 documents. We know that they are a major motivator and
5 instrumentality in the contracting and competitive activities
6 of Ortho.

7 So when do we subpoena them? October 12th. As Your
8 Honor can see from the bottom of the second page, we agree, we
9 said we know this will take some time; we'll give you until
10 December 15th, Patterson Belknap, to work with CRA, to produce
11 the documents responsive to these subpoenas. We didn't get
12 them on December 15th. We got them just a couple of weeks ago.
13 And what did we get? 326 million -- 326,000 pages.

14 So without belaboring this, this chart demonstrates
15 that since October when they protested that their document
16 production was complete, we've received over a million pages of
17 documents, and as recently as last week and the week before.
18 That's the production that we've received.

19 We need updated data. We've had some discussions
20 with Ortho's counsel about updating the database information.
21 Why? I think you heard a little bit from both Mr. Whitney and
22 Mr. Haas about the dynamics --

23 THE COURT: Uh-huh.

24 MR. GRIFFINGER: -- of this marketplace and what's
25 happened. The cutoff was January, I think January 8th of 2007.

1 I think everybody's told you that. It's Haas's December 31,
2 it's virtually the same thing.

3 But what has happened since that cutoff date, in
4 March of 2007, the Black Box warning was imposed upon both
5 companies which changed the dynamics of the marketplace. In
6 July -- on July 30th, 2000, there was something called the
7 National Coverage Decision. And that's a decision by CMS,
8 that's as everybody's told you, that's the outfit that sort of
9 governs the Medicare reimbursement program.

10 In that decision a limited reimbursement for this
11 class of drugs. That, again, had a major impact on the
12 marketplace and on sales.

13 In November of 2007, there were label revisions and
14 Ortho came out with a new agreement in November of 2007; and,
15 subsequently, with a 4.8 percent price increase. And that's
16 just in 2007. Now what's happened? What happened in the
17 marketplace? I'm sorry to say for my client that the demand
18 for these drugs has dropped by 50 percent. What was a growing
19 market has dropped down to approximately 50 percent of what it
20 was the year before. That's a huge see change in a competitive
21 marketplace.

22 What has happened even since? Today as we sit here,
23 and Mr. Haas is well aware of this, Amgen has rolled out a new
24 contract effective today. Again, a new change in the
25 marketplace.

1 In March, next month, there is going to be a meeting
2 of ODAC. That's O-D-A-C. That's the Oncologic Drug Advisory
3 Committee. That's a committee that advises the FDA about the
4 safety and efficacy of drugs. They're meeting with respect to
5 these drugs, Procrit, Aranesp, and Epogen. They're going to
6 take a good look at safety and efficacy which has been in the
7 papers and has been the subject of some discussions that Your
8 Honor may be familiar with. I think we mentioned it last time
9 when we were in chambers with you.

10 Nobody knows what ODAC will do or recommend to the
11 FDA or what the FDA will adopt following March -- the March
12 meeting and presentations. As I say, I give you this
13 background because it is such a dynamic and changing and fluid
14 marketplace.

15 All of these things have impacts upon competition.
16 Now why do I give you that background? Because we want updated
17 databases of information on sales and costs and other material
18 information that will go into the expert's review of whether or
19 not there is an antitrust violation in this marketplace.

20 Experts cannot opine on data that is stale and we
21 have discussed this with counsel. I think we have a tentative
22 agreement. I'm not going to put words in their mouth, that
23 we'll update the databases, the critical databases through year
24 end 2007. We would like it updated through June 30 of this
25 year because the experts are not going to be putting in their

1 reports in our view until after that, and we'll need that
2 current information. And you will see when I hand up our
3 proposed schedule that that is what we seek. And that's the
4 crucial, that's the guts of this case, these databases, the
5 costs and the revenue and discount rebate information.

6 So I'm giving you the context of why we do that. How
7 does that tie into the schedule? Well, because of the, we
8 politely call it, tardy document production that I've given you
9 on a chart, because of the database updated needed, that's two
10 points. Let me give you a couple more and I'll try to do this
11 quickly.

12 Last night, last night we received electronically the
13 general ledger of Ortho. The general ledger has all the key
14 sales cost information. We are still trying to work out with
15 Ortho a substitute for plunging into the general ledger and its
16 intricate detail. We haven't looked at it because it came in
17 about seven o'clock last night electronically, and I quit about
18 that hour I think last night. Well, actually, I didn't. I
19 didn't look at the general ledger.

20 We also got in last night a privilege log. We've
21 exchanged privilege logs. This is an important point if I may
22 make it. And that is, in the privilege log that we received
23 from Ortho last night, there were 47,976 entries. Now I know
24 Your Honor really wants to do an in-camera review of that.

25 THE COURT: Can't wait.

1 MR. GRIFFINGER: But we -- we are not there; and,
2 hopefully, we'll never be there. But in that log, there are
3 34,250 documents which were withheld entirely on the basis of
4 privilege, 13,750 documents were redacted on the basis of
5 privilege. More than 4,000 documents have a blank author field
6 and 21,887 have entirely blank recipient fields.

7 And we just printed out about 20 pages of that log,
8 not a random sample because we printed this out by asking for
9 author unknown and recipient unidentified. And if I may hand
10 up to Your Honor what we are facing with this privilege log. I
11 think you will see from this that it's going to be very
12 difficult for us to test this privilege log because we can't
13 take the deposition of the author or the recipient to find out
14 if it's truly confidential.

15 Unlike the argument you just heard about Mr. Hansen's
16 deposition where he was asked about documents, thumbing through
17 this, a couple of names of CCs are mentioned, but other than
18 that, we draw a blank.

19 So this is going to be a problem not for today, but
20 it's going to be a problem and we will meet and confer and see
21 how far we can get.

22 We still have some issues on redactions. They
23 unredacted 150,000 documents which we have to re-review. We
24 still have some specially specifically identified document
25 issues that we're trying to work through. Again, trying to

1 keep all this off -- off your docket. But nonetheless things
2 that are going on that you should know about.

3 And let me talk about the depositions, because Mr.
4 Haas said, we've -- they've started depositions. Your Honor,
5 we had an agreement of 25 depositions per side. As I think
6 Your Honor recalls, we had a little dispute about something and
7 we resolved it. I don't know whether it was with Your Honor in
8 chambers, or whether we did it in the room next door here, but
9 we agreed. Okay, one more per side, and unless Your Honor has
10 an objection, we have agreed to 26 and 26.

11 THE COURT: Uh-huh.

12 MR. GRIFFINGER: Now they've taken about five. We
13 haven't taken any because we have noticed several, and they're
14 on the boards very quickly, but we wanted to get the document
15 production complete as we've said to you many times, and we've
16 put out a 30(b)(6) notice. That 30(b)(6) notice went out on
17 January 9th and they responded and identified people who would
18 be the representatives of Ortho to tell us who would talk about
19 which subjects.

20 We got that response on January 28th, earlier this
21 week, I guess that's Monday of this week. And they named eight
22 people, and that's, exactly, of course, what we wanted to know
23 who these folks are, so we can get going on it. And, of
24 course, our next step was, okay, when are they available, these
25 eight people? I have an e-mail that came in Wednesday saying,

1 three of these people will be available on the following dates:
2 February 14th, March 7, March 13. That's three of the five,
3 two in March, one or two days before the present deadline for
4 fact discovery. That's going to make life a little difficult
5 for us to complete discovery by March 15th.

6 So if everybody takes the allowed depositions, we're
7 talking about a remaining number of about 47 depositions, and
8 we have 29 business days between now and the current deadline.
9 And we've done double tracking before, but that is really
10 unreasonable, unfair, and prejudicial to us who have just
11 received documents. Who still have issues going -- just got a
12 privilege log, just got a general ledger for all these things
13 we think -- we don't have a trial date. Judge Chesler has not
14 set a trial date, and there's no prejudice to extending the
15 discovery schedule.

16 We're not asking for any change in the trial date or
17 pretrial date which has not yet been set. That's up to Your
18 Honor and Judge Chesler. What we're asking for is an extension
19 of discovery, so that we can get the information rationally, so
20 that we can get updated information to our experts, so that the
21 reports are going to be meaningful in the environment, the
22 dynamic and changing environment that we are in.

23 And for that reason I'd like to hand up to Your Honor
24 a proposed schedule that we sent to Mr. Haas. There's one
25 change that I'd like to call to Your Honor's attention. We

1 said update the data through March 30 in the one we sent to Mr.
2 Haas, but we -- we'd like to update the data through June 30
3 for the reasons I've said. So I'll give you Version 2 which is
4 virtually the same, except for the first entry asking for --
5 not that.

6 All we're asking for, Your Honor, here, and I don't
7 think it's irrational at all, and I know there's always a
8 temptation when we ask for something, and they resist, to be
9 solemnonic about and try to say, okay, I'll go somewhere in
10 between. I hope Your Honor respects the fact that all we're
11 asking for is a two-and-a-half-month extension on fact
12 discovery and dates that flow from that.

13 And here's my problem. Your Honor has said that you
14 were going to reconvene with us on February 29th if necessary.
15 That gets very close to the existing March 15th fact discovery
16 deadline. So I can't ask Your Honor to rule, but I would like
17 some indication from Your Honor that we are not going to have
18 to notice 49 -- 47 depositions between now and March 15th. And
19 I hope that we can at least get some indication of that today.

20 Thank you.

21 MR. HAAS: If I may briefly?

22 THE COURT: Mr. Haas.

23 MR. HAAS: Briefly?

24 THE COURT: Very, very briefly.

25 MR. HAAS: Okay.

Argument - Haas

1 THE COURT: I'm pretty clear on these issues here.

2 MR. HAAS: Your Honor, first of all with respect to
3 the chart, we can create one of these for every single document
4 and representations stated, because I'm sure you're aware of
5 the litigation experience.

6 The top half is the conversion.

7 THE COURT: Uh-huh.

8 MR. HAAS: The bottom half is what pertains to every
9 single document in this case. Every single one. They want us
10 to pay for what every other document -- they want a special
11 exemption for their backup tape files that is different from
12 every other single document case. That's contrary to the law
13 of contract defining agreement. The case wasn't in New Jersey
14 case, it was New York State Supreme Court case. That case
15 there was -- there was not an issue with respect to cost
16 shifting because of the --

17 THE COURT: The Delta case.

18 MR. HAAS: Yes, the Delta Financial case.

19 THE COURT: Yeah.

20 MR. HAAS: The party agreed up front to pay. The key
21 to that case was whether they were entitled to discovery at all
22 from backup tapes.

23 So this issue wasn't even on the table. That case is
24 inapposite. It doesn't apply. It doesn't govern.

25 Respect to duplicates by the way, there will be

Argument - Haas

1 nothing duplicative about this. The vendor as you should be
2 aware, screens duplicative e-mails and files. All we're
3 getting is what's new. That's the only thing that we're --
4 there's going to be a review of only what's new.

5 With respect to the production and whether we we've
6 been dilatory. Your Honor, we have been doing exactly what we
7 said we would do. We -- the 400,000 pages were from Mr. Haney
8 (phonetic). That's the one custodian that was delayed. We
9 explained why there was. They still had 30 dep -- 30
10 custodians they could have proceeded with.

11 The other documents were already produced. We
12 unredacted them. So we're just taking the redactions away.
13 That was less than one percent. Less than one percent of the
14 total pages. You can't start your 30(b)(6) witnesses in
15 October when we did because of less than one percent? That's
16 not a valid point whatsoever.

17 And, indeed, when you get to that 30(b)(6) notice,
18 which if you take a look at it, Your Honor, I gave it to Your
19 Honor, it's extraordinarily broad. Why not serve that when we
20 did back in October? Then you wouldn't be running into these
21 self-created deadlines. This is all stuff imposed. We have
22 done everything every step of the way.

23 The general ledger, it wasn't produced yesterday for
24 the first time. It was produced months ago, after we in May of
25 last year had to go into court to get an order to exchange date

Argument - Haas

1 of time of that. In the fall, Magistrate Falk said, Amgen,
2 extend your general ledger data. They took another month to do
3 it. We exchanged general ledger databases way back in the
4 fall.

5 We in fact produced it in the manner in which it was
6 maintained. Amgen came back and said, no, no, no, no, we want
7 it in a different manner. We said, we don't have it in that
8 manner, but we can retain people to actually program that. But
9 Amgen, you could do the same thing. They said, no, no, no. We
10 want you to do it. So at our cost, we went out and we created
11 a new database which we produced to them. So we've done it
12 twice. It's not been a delay on our part.

13 You see, this is the quandary we're in, Your Honor.
14 We are opening our doors, we are doing everything to give
15 discovery, and every time we give additional stuff and they
16 don't, we get penalized because they say, well, look, we just
17 came in. It came in because we are opening our doors. We are
18 doing what everybody says we should.

19 We go to the Court, the Court says, unredact. We
20 unredact. We give it. And now they say, oh, we need a delay
21 because it's less than one percent of the documents? It's time
22 to get this case to trial. The delay that they're asking for
23 here is not two and a half months, it's another five months.
24 We're pushing off the dispositive motion period to the
25 beginning of 2009. That means we're not having a trial until

1 at least mid 2009.

2 Your Honor, you know what the real issue is here?
3 The issue has nothing to do with discovery and discovery
4 schedules. McDermott, Will & Emery is trying a case out in the
5 Ninth Circuit. That case is the Cascade Financial case. It
6 uses -- it has adopted a different standard than the Third
7 Circuit. Amgen doesn't like the LaCage (phonetic) case and
8 this standard. They don't like this Court's rule of law.
9 They're hoping that case gets brought up. It's now undone
10 before the Ninth Circuit.

11 They want to try to move that case, get it to the
12 Supreme Court, hoping to change the law of this circuit.
13 That's what this delay is all about. That's what we're dealing
14 with here. This case should not be driven by their hopes and
15 expectations and now in the Ninth Circuit.

16 Thank you, Your Honor.

17 MR. GRIFFINGER: Your Honor, I must object to that
18 last part. I hope Your Honor will disregard it.

19 Thank you, Your Honor.

20 As far as the general ledger that was produced
21 earlier, here's a copy of it.

22 THE COURT: Thank you.

23 MR. GRIFFINGER: I rest -- I rest my case.

24 MR. HAAS: You saw this last time, Your Honor. I
25 could print out a copy of every single page of the general

1 ledger that Amgen produced that looks just as jumbled. This is
2 data. It's TIF data produced with codes. We run it into a
3 database and you can use it. It's exactly what came out of our
4 regular course of business production.

5 MR. GRIFFINGER: Thank you, Your Honor.

6 THE COURT: Thank you, Counsel.

7 At this time, while I understand Mr. Griffinger was
8 interested in getting some kind of indication from the Court as
9 to the scheduling piece, I'm not prepared to do that at this
10 particular moment.

11 I did want to hear from both sides as to what the
12 salient points were before making that decision. I'm going to
13 ask both sides if you have not done so already, and you may
14 have to submit proposed forms of order with regard to the
15 arguments presented here today,

16 I do still plan on proceeding as I set forth at the
17 outset, and that is to allow you to address the one issue. I
18 really don't think that we're going to have to have oral
19 argument on that; however, I at least wanted both sides to
20 fairly address the issue, so that we could have everything
21 encompassed in one or in one ruling.

22 What I may do with regard to the scheduling component
23 is, extract that one issue and address that as early as
24 possible prior to resolving the other matters, okay?

25 MR. GRIFFINGER: That would be very helpful.

1 THE COURT: Let me also say this, Counsel, I really
2 appreciate the quality and the caliber of representation here
3 today, but please no one submit anything further on the issues
4 that were argued here today. I don't want any other
5 submissions between now and the time that I rule on this
6 matter. Okay?

7 MR. GRIFFINGER: Just --

8 THE COURT: Thank you, Counsel.

9 MR. HAAS: Thank you, Your Honor.

10 THE COURT: Have a great day.

11 MR. WHITNEY: Your Honor, would you like a separate
12 proposed forms of order on the schedule versus the two other
13 issues that are before you?

14 THE COURT: That would be very helpful. Thank you
15 very much. I would like that.

16 Thank you.

17 MR. WHITNEY: Okay. Thank you, Your Honor.

18 MR. GRIFFINGER: Thank you, Your Honor.

19 (Proceedings concluded at 12:15 p.m.)

20 I, certify that the foregoing is a correct transcript
21 from the electronic sound recording of the proceedings on
22 February 1, 2008, 10:45 a.m. to 12:15 p.m. in the above-entitled
23 matter.

24 02/19/08
Date

s/ Lisa Mullen
Lisa A. Mullen
KLJ Transcription Service

25